

been tested and was not ready for Conditional Acceptance by December 31, 1994 (the date required by the Purchase Agreement), and Motorola had not provided any of the Advanced Features by March 31, 1995. As of the date of filing of this Complaint, the System still is not ready for acceptance³ testing or Conditional Acceptance, and none of the Advanced Features have been provided.

68.

Southern does not know whether or when Motorola will provide it with many of the features and capabilities of the System required by the Purchase Agreement, including the Advanced Features.

69.

Motorola's delays in providing Southern with a commercially-operable ESMR system and with the Advanced Features and other System features required by the Purchase Agreement have delayed Southern's entry into the market to compete to provide mobile radio communications services to the public and private sectors. This has impaired Southern's ability to compete in the Public Safety Radio Market, with the result that Southern likely will lose customers to Motorola.

70.

Moreover, Motorola has willfully and falsely disparaged Southern's System, the services to be provided through the System, and Southern's business plan for the System. This disparagement includes representations made to certain state and local public safety agencies that the System is not appropriate for use by public safety agencies in the Public Safety Radio market. Prior to entering into the Purchase Agreement, Motorola was aware that Southern intended to use the System to market and sell mobile radio communication services to the Public Safety Radio market, and had represented to Southern that the System could be used by public safety agencies in the Public Safety Radio market.

71.

On numerous occasions, Southern has notified Motorola of Motorola's misconduct and of the problems and failures with respect to both the System and Motorola's performance under the Purchase Agreement. Southern has specifically notified Motorola of Motorola's substantial and material breaches and anticipatory breaches of the Purchase Agreement and has demanded that Motorola cure its breaches and provide adequate assurances that it will perform as required by the Agreement. However, Motorola has failed and refused to cure the breaches or provide reasonable or adequate assurances of performance.

72.

In sum, Motorola has engaged in a persistent course of fraudulent and wrongful conduct towards Southern in entering into and performing under the Purchase Agreement. The result is that the system that Motorola is providing to Southern is different in many material respects from what is required in the Purchase Agreement, does not have many of the features, capabilities and reliability required by the Agreement, will cost significantly more than was anticipated, and will be completed and operational much later than Southern intended and than the Purchase Agreement required.

73.

Motorola's conduct was intended to impair, and has impaired, Southern's ability to compete with Motorola in the Public Safety Radio Market.

COUNT I

MOTOROLA'S FRAUD IN THE INDUCEMENT

74.

Southern restates and incorporates herein the allegations of paragraphs 1 through 73 of this Complaint as though fully set forth herein.

75.

During discussions and negotiations prior to the execution of the Purchase Agreement, Motorola misrepresented, concealed, and

withheld from Southern material facts regarding its MIRS technology and regarding the proposed System to be provided to Southern. These misrepresentations and omissions include (but are not limited to) the following:

(1) misrepresenting that the System could be constructed and operated in the designated geographic service area through use of only 231 tower sites;

(2) misrepresenting that the System would allow for seamless communications throughout the geographic service area even if the System had approximately 280 tower sites;

(3) concealing and failing to disclose that Motorola could not provide a System with single DAP that would allow seamless communications throughout the designated geographic service area if the System had more than approximately 235 tower sites;

(4) concealing and failing to disclose that the MIRS technology and associated equipment and software had other inherent limitations such that Motorola would not be able to provide the System specified in the Purchase Agreement if the System required more than approximately 235 tower sites;

(5) concealing and failing to disclose practical limits on the heights of radio transceiving towers to be incorporated into the System, which adversely impacted the feasibility of constructing Southern's System with 231 tower sites;

(6) misrepresenting that the System could use 6-to-1 channel splitting to meet specified communications traffic requirements while still providing voice communications with clear audio quality and dispatch access time of less than 500 milliseconds;

(7) misrepresenting that it could provide, install and test the System such that it would be conditionally accepted and available for commercial operation by December 31, 1994;

(8) misrepresenting that it would provide Southern with the Advanced Features in a timely manner; and

(9) otherwise concealing and withholding information, including technical limitations, that indicated the impossibility or infeasibility of Motorola providing Southern with the System as required by the Purchase Agreement.

76.

Motorola intended to mislead and defraud Southern through its misrepresentations and omissions regarding MIRS technology and regarding the System, and to induce Southern to believe, accept and rely upon such misleading and fraudulent statements as true and accurate, so as to induce Southern into entering into the Purchase Agreement.

77.

Southern justifiably relied upon Motorola's misleading and fraudulent statements and omissions in entering into the Purchase

Agreement and in preparing its business plans for the System. Southern Services would not have entered into the Purchase Agreement if it had known of Motorola's misrepresentations or of the facts that Motorola failed to disclose.

78.

Motorola's misstatements and omissions have caused Southern to incur substantial losses.

79.

As a direct and proximate result of the foregoing, Southern is entitled to rescind the Purchase Agreement, return to Motorola all System equipment and software provided by Motorola, and recover damages or other remuneration so as to be put into the position it was prior to entering into the Agreement.

80.

In the alternative, Motorola's conduct has caused and will continue to cause Southern to sustain substantial actual damages in an amount believed to exceed \$100 million, which Southern is entitled to recover from Motorola.

81.

Motorola's misstatements, omissions, and other fraudulent conduct were intentional, willful, reckless, and made with conscious indifference to the consequences, thereby entitling Southern to recover punitive damages.

COUNT II

MOTOROLA'S FRAUD IN THE PERFORMANCE

82.

Southern restates and incorporates herein paragraphs 1 through 81 of this Complaint as though fully set forth herein.

83.

Once the Purchase Agreement was executed, Motorola continued to misrepresent and conceal material facts regarding the System, the technical limitations of its MIRS technology and of the System, and its performance under the Purchase Agreement. These misrepresentations and omissions include (but are not limited to) the following:

(1) initially objecting to and failing to agree with the radio frequency coverage plan prepared on behalf of Southern, which reflected that the System would require approximately 280 tower sites, in an effort to conceal (i) the misrepresentations and defects inherent in Motorola's initial proposal that the System would require only 231 sites, and (ii) the inherent limitations of its technology which could not provide the seamless communications or other features required by the Purchase Agreement in the event that the System required more than approximately 235 tower sites;

(2) representing that the basic System features were installed and operational, and that the System was ready for

acceptance testing and Conditional Acceptance, while concealing significant areas in which the System installed by Motorola was not complete or not reliable and/or did not comply with the specifications of the Purchase Agreement;

(3) concealing and failing to disclose that it had delayed development and implementation of many of the features required by the Purchase Agreement, including the Advanced Features;

(4) concealing the impact and effects of changes and modifications made to the System by Motorola;

(5) concealing the inadequate and inconsistent voice quality of the telephone interconnect service;

(6) misrepresenting that the System could use 6-to-1 channel splitting to meet specified communications traffic requirements while still providing voice communications with clear audio quality and dispatch access time of less than 500 milliseconds;

(7) otherwise concealing and withholding information as to technical limitations that made it impossible for Motorola to provide Southern with the System required by the Purchase Agreement; and

84.

Motorola intended to mislead and defraud Southern through these misrepresentations and omissions, so as to induce Southern into believing for as long as possible that Southern was receiving the System for which it contracted (including the features and capabilities for which it contracted), until Southern had invested such time and money into the System that it was difficult or impractical for Southern to rescind or terminate the Purchase Agreement or commence construction of an alternative wireless communication system.

85.

Southern has justifiably relied upon Motorola's misleading and fraudulent statements and omissions in various ways, including by continuing to perform under the Purchase Agreement and continuing to invest in an ESMR system using MIRS technology.

86.

Motorola's misstatements and omissions have caused Southern to incur substantial losses.

87.

As a direct and proximate result of the foregoing, Southern has sustained and will continue to sustain substantial actual damages in an amount believed to exceed \$100 million, which it is entitled to recover from Motorola.

88.

Motorola's misstatements, omissions, and other fraudulent conduct were intentional, willful, reckless, and made with conscious indifference to the consequences, thereby entitling Southern to recover punitive damages.

COUNT III

BREACHES OF PURCHASE AGREEMENT

89.

Southern restates and incorporates herein paragraphs 1 through 88 of the Complaint as though fully set forth herein.

90.

Motorola has materially and substantially breached the Purchase Agreement in at least (and without limitation) each of the following ways:

(1) By failing to deliver, install and implement the System so that it conforms with System specifications and performs substantially in accordance with System specifications, in violation of various sections of the Purchase Agreement including Sections 4.3, 10.1.1, 10.1.2, 10.1.3, and 10.2.1;

(2) By failing to perform its obligation to provide a System which allows seamless communications such that a mobile station radio unit can "travel freely throughout the total

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service area and originate or receive dispatch calls without regard to its current location," in violation of Section 1.1.3.1 of Exhibit B1 of the Purchase Agreement and other sections of the Purchase Agreement;

(3) By failing to provide a [#]System that will use 6-to-1 channel splitting to meet specified communications traffic capacity requirements while still providing voice communications with clear audio quality and dispatch access time of less than 500 milliseconds;

(4) By interfering with and delaying Southern's performance of its obligations under the Purchase Agreement, including Southern's obligation to provide a radio frequency coverage plan and to build tower sites;

(5) By failing to provide essential components, equipment, software, features, capabilities, and reliability of the System necessary for Conditional Acceptance of the basic System by December 31, 1994;

(6) By delaying development, implementation and delivery of numerous System features, including the five Advanced Features, required by the Purchase Agreement;

(7) By failing to include a system test as part of its acceptance test procedures for the System, in violation of Section 9 and Exhibit C of the Purchase Agreement;

(8) By making changes, modifications and substitutions in the System which adversely affect physical or functional interchangeability or performance of the System or components of the System, without a written agreement made after full disclosure to Southern of the effects of such changes, in violation of Section 11 of the Purchase Agreement;

(9) By failing to keep Southern advised of modifications required for the System, in violation of Section 4.7 of the Purchase Agreement;

(10) By violation of the Motorola policy, stated in Section 5.3 of the Purchase Agreement, to not deal unfairly or unethically with Motorola customers, including Southern; and

(11) By failing to furnish or make available to Southern all information relating to ESMR technology and industry trends which Motorola furnishes or makes available to its other ESMR customers, in violation of Section 5.5 of the Purchase Agreement.

91.

In addition to breaching the express terms of the Purchase Agreement, Motorola's conduct described herein violates its inherent contractual duties of good faith and fair dealing.

92.

The nature and magnitude of Motorola's breaches are so great that Southern has been deprived of the substantial value of its

bargain and that the Agreement and the remedies provided therein fail of their essential purpose.

93.

On numerous occasions, Southern has notified Motorola of aspects of the system that do not conform with the specifications of the Purchase Agreement or of Motorola actions or omissions that do not comply with the terms of the Purchase Agreement.

94.

On February 21, 1995, Southern sent a letter to Motorola, under Section 19 of the Purchase Agreement, notifying Motorola of numerous substantial material breaches of the Purchase Agreement. This letter demanded that Motorola cure all defaults and breaches, and that Motorola provide detailed and adequate assurances that it would cure all pending defaults in a timely and expeditious manner and would fully perform under the terms of the Agreement.

95.

Motorola has failed and refused to cure its defaults under the Purchase Agreement or to provide reasonable or adequate assurances of due performance.

96.

Southern has engaged in numerous discussions, consultations, and negotiations with Motorola in a good faith effort to obtain assurances that Motorola will cure its breaches and perform as required by the Purchase Agreement and to attempt to resolve the

disputes and disagreements between the parties. These discussions and negotiations have been unsuccessful.

97.

As a result of Motorola's failure to cure its breaches and defaults and failure to provide adequate assurances of due performance, Motorola has repudiated the Purchase Agreement.

98.

Southern Services is entitled to and hereby exercises its right to terminate the Purchase Agreement without liability pursuant to Section 19.1 of the Agreement.

99.

As a result of Motorola's breaches of and repudiation of the Purchase Agreement, all of Southern Services' obligations to perform under the Purchase Agreement, including any obligation to pay for the System, have been excused.

100.

In addition, Motorola's breaches and wrongful conduct excuse, terminate, and void any obligation of Southern Services to purchase Motorola mobile subscriber units under the Subscriber Purchase Agreement that was entered into in connection with the Purchase Agreement.

101.

Southern is entitled to recover stipulated damages from Motorola under Section 5.6.7 of the Purchase Agreement as a result

of Motorola's failure to achieve Conditional Acceptance of the System by December 31, 1994 and to provide the Advanced Features within the periods specified in Section 5.6.7.

102.

Motorola's material and substantial breaches of the Purchase Agreement have caused and will continue to cause Southern to sustain substantial actual damages in an amount believed to exceed \$100 million, for which Motorola is liable.

COUNT IV

PRODUCT DISPARAGEMENT

103.

Southern restates and incorporates herein paragraphs 1 through 102 of the Complaint as though fully set forth herein.

104.

Motorola has disparaged the System and Southern's mobile radio communications service and business by false or misleading representations of fact, including false and misleading representations made to certain state and local public safety agencies that the System and the mobile radio communications services to be provided by Southern are not appropriate for use in the Public Safety Radio Market.

105.

This disparagement was willful and made with the intent to harm Southern and Southern's business.

106.

This conduct violates the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et. seq., and also amounts to disparagement in violation of the common law.

107.

Southern is entitled to preliminary and permanent injunctive relief enjoining Motorola from disparaging the System and the mobile radio communications services and business to be provided by Southern, and specifically enjoining Motorola from representing that the System and the services to be provided thereunder are not appropriate for use in the Public Safety Radio Market.

108.

Motorola's willful disparagement has caused Southern to sustain substantial actual damages, including loss of business and business opportunities, for which Southern is entitled to recover from Motorola.

109.

Motorola's disparagements were intentional, willful, reckless, and made with conscious indifference to the consequences, thereby entitling Southern to recover punitive damages.

COUNT V

MONOPOLIZATION OF AND ATTEMPT TO MONOPOLIZE
THE PUBLIC SAFETY RADIO MARKET

110.

Southern restates and incorporates herein paragraphs 1 through 109 of this Complaint as though fully stated herein.

111.

Public Safety Radio is a relevant product market. Public Safety Radio users form a distinct customer group with needs for specialized performance requirements in their mobile radio systems and are served by specialized vendors.

112.

The providers of Public Safety Radio equipment sell to Public Safety Radio users throughout the United States. On information and belief Motorola controls in excess of 70% of the Public Safety Radio market in the United States.

113.

Motorola has engaged in the following activities among others with the specific intent to monopolize and attempt to monopolize, with the dangerous probability that it will succeed in monopolizing, the Public Safety Radio market:

(a) dominating the APCO 25 standards setting process and improperly influencing and causing APCO to adopt proprietary

equipment standards which can be met only by Motorola's ASTRO system, rather than functional standards;

(b) utilizing false representations regarding the capability of MIRS technology in order to induce Southern Services to commit through contract, investment, and the passage of time to the Motorola MIRS technology, thereby preempting Southern's use of competing technology and allowing Motorola to impair Southern's ability to compete by delaying and increasing the cost of Southern Communications' entry into the Public Safety Radio market;

(c) intentionally delaying the development of features contracted for by Southern that would enable Southern Communications to compete more effectively in the Public Safety Radio market; and

(d) falsely disparaging the services to be provided by Southern Communications.

114.

Motorola has monopolized and/or attempted to monopolize the market for Public Safety Radio in the United States in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

115.

As a direct and proximate result of Motorola's monopolization and attempt to monopolize the Public Safety Radio market in the United States, Southern has been injured and will continue to be injured in the following respects, among others:

(a) Southern has incurred increased costs to obtain and implement the System;

(b) Southern has been delayed in its market entry with the result that Southern likely will lose Public Safety Radio customers to Motorola and will be impaired in its ability to compete with Motorola for Public Safety Radio customers; and

(c) Southern likely will lose customers, including the State of Georgia, to Motorola as a result of Motorola's predatory conduct.

116.

Southern has been damaged by Motorola's monopolization of and attempt to monopolize the Public Safety Radio market in an amount to be proved at trial but believed to be in excess of \$100 million.

117.

Southern will continue to be damaged by Motorola's monopolization and attempt to monopolize unless it is provided with injunctive relief.

COUNT VI

DECLARATION OF INVALIDITY OF CONTINGENCY PURCHASE AGREEMENTS

118.

Plaintiffs restate and incorporate herein the allegations of paragraphs 1 through 117 of this Complaint as though fully set forth herein.

119.

Pursuant to and based on the Purchase Agreement, certain of Southern's affiliates -- Georgia Power Company, Alabama Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (collectively, the "Operating Companies") -- entered into Contingency Purchase Agreements with Motorola, whereby the Operating Companies agreed to pay for portions of the System in the event that Southern Services failed to purchase all or any portion of the System as and when required to do so under the Purchase Agreement.

120.

By virtue of Motorola's wrongful conduct as alleged above, which repudiated and justified termination and rescission of the Purchase Agreement, the Contingency Purchase Agreements are likewise rendered void and unenforceable.

121.

An actual controversy of a justiciable nature exists between the Operating Companies and Motorola involving the rights, obligations and liabilities, if any, of the parties arising from the Contingency Purchase Agreements. Therefore, the Operating Companies seek a declaration that they have no obligations or liabilities under, and that Motorola has no rights under, the Contingency Purchase Agreements, as these agreements have been rendered void and unenforceable.

WHEREFORE, Southern prays that it be granted the following relief:

(a) pursuant to Counts I and II, (i) that a judgment be entered ordering the rescission of the Purchase Agreement and allowing Southern to return to Motorola all System equipment and software provided by Motorola and to recover damages or other remuneration to put it back into the position it was prior to entering into the Agreement; or, in the alternative, that Southern have a judgment against Motorola for all damages suffered by Southern due to Motorola's fraudulent conduct, and (ii) that Southern also recover punitive damages in an amount to be determined by the enlightened conscience of the jury;

(b) pursuant to Count III, that the Purchase Agreement be rescinded, and that Southern have a judgment against Motorola for stipulated damages and for all actual damages suffered due to Motorola's breaches of the Purchase Agreement;

(c) pursuant to Count IV, that Motorola be preliminarily and permanently enjoined from disparaging the System or the mobile radio communications business or services of Southern, and that Southern be awarded its actual damages caused by Motorola's disparagement and punitive damages in an amount to be determined by the enlightened conscience of the jury.

(d) pursuant to Count V, that Southern have a judgment against Motorola for all damages suffered by Southern due to Motorola's

monopolization and attempted monopolization and that the amount of such damages be trebled;

(e) pursuant to Count V, that Motorola be permanently enjoined from disparaging the System or the wireless communications business or services of Southern;

(f) pursuant to Count VI, that the Court declare that the Contingency Purchase Agreements between the Operating Companies and Motorola are void and unenforceable and that the Operating Companies have no obligations or liability thereunder and that Motorola has no rights under the Contingency Purchase Agreements;

(g) that Southern be awarded its reasonable attorneys fees and costs associated with the prosecution of this action;

(h) that this Court award such other and further relief-as it deems just and appropriate; and

(i) that Southern have a jury trial of all issues properly tried to a jury.

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This 5th day of May, 1995.

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